

NO. PD-0563-17

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/4/2018
DEANA WILLIAMSON, CLERK

TERRI REGINA LANG,
Appellant

v.

THE STATE OF TEXAS
Appellee

Appeal in Cause No. 42185 in the
424TH Judicial District Court of Burnet County, Texas and
Third District Court of Appeals No. 03-15-00332-CR

Brief For Appellee

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January 4, 2018

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Statement Of The Case

Appellant has reasonably stated the Statement of the Case.

Statement on Oral Argument

The undersigned does not believe that Oral Argument will be beneficial for this case for the reason that the issues does not contain complex nuances. However, in such event that this Court should believe that Oral Argument would assist the Court, the undersigned will gladly participate.

Response to Issues Presented

Issue No. One:

- (a) The lower court correctly followed the holding of *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) because Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) can be read clearly and without ambiguity.
- (b) The holding of *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) is not in conflict with Tex. Gov. Code § 311.023.

Issue No. Two:

Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is written in a clear and concise manner in which both the statute as well as the Legislature contemplates the prosecution of a lone individual without requiring proof that the individual was acting together with one or more other individuals.

Issue No. Three:

While Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) criminalizes the underlying conduct of theft, the viability of the statute does not depend upon “simple” theft being a lesser-included offense.

Statement Of The Facts

Appellee will accept the Statement of the Facts as described by Appellant.

Summary Of The Argument on Issue No. 3¹

While Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) criminalizes the underlying conduct of theft, the viability of the statute does not depend upon “simple” theft being a lesser-included offense.

Appellant argues that she can not be guilty of the offense of Organized Retail Theft because the offense of “simple” theft can not be a lesser-included offense. However, while Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) requires proof that the retail merchandise is stolen, this statute is not a mere enhancement of the “simple” theft statute but instead an entirely different offense.

¹ Appellant has chosen to number her issues in one sequence and then argue her issues in reverse order. Pursuant to TRAP 38.2(a)(2) the undersigned will respond in the reverse order as well.

Argument On Issue No. 3

3.1 Principals of Law

3.1.1 A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barter, sells, or disposes of:

(1) stolen retail merchandise; or

(2) merchandise explicitly represented to the person as being stolen retail merchandise.

Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011).

3.1.2 A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of the property.

Tex. Penal Code § 31.03(a).

3.1.3 A person commits an offense if, with intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of the following.....

Tex. Penal Code § 71.02 (a).

3.1.4 “Combination” means three or more persons who collaborate in carrying on criminal activities.....

Tex. Penal Code § 71.01(a).

3.1.5 “Retail Merchandise” means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment.

Tex. Penal Code § 31.01 (11).

3.1.6 Courts may not rewrite a statute that is not readily subject to a narrowing construction because such a rewriting constitutes a serious invasion of the legislative domain and sharply diminishes the legislature's incentive to draft a narrowly tailored statute in the first place. *Ex parte Thompson*, 442 S.W.3d 325, 339 (Tex. Crim. App. 2014).

3.2 *Applicable Facts*

On October 2, 2013, HEB employee Candice Griffith was working in the general merchandise portion of the HEB located in Marble Falls, Burnet County, Texas. 3 R.R. at 9 - 10. Griffith noticed Appellant shopping with reusable bags. 3 R.R. at 10 - 11. Griffith observed that Appellant was placing the selected groceries directly into the reusable bags. 3 R.R. at 11. Griffith also noted that when Appellant was placing items into the bags Appellant was looking around. 4 R.R. at 7. Griffith continued to monitor Appellant shopping for an hour. 3 R.R. at 11.

At the point where Griffith observed Appellant go to the check-out counter, Griffith observed that all but one of the reusable bags were in a basket. The other reusable bag was tied to the side of the cart/basket that would face away from the check-out counter. 3 R.R. at 12. At the point where Appellant arrived at the

check-out counter Griffith went to an area where she could observe Appellant while Appellant was checking out in order to see what was coming out of the cart/basket Appellant was using. 3 R.R. at 12. As Appellant got to the counter Griffith notified the store manager that they possibly had someone walking out with product without paying. 3 R.R. at 14.

At the counter Griffith observed Appellant place all of the full reusable bags containing groceries onto the counter conveyor belt except for the bag of groceries tied to the side of the cart/basket. 3 R.R. at 14 - 16. Once Appellant had completed her purchase she exited the store at the main metal doors without paying for the merchandise that was in the bag tied to the side of the cart/basket. It was at this point that Appellant was confronted by Griffith and the store manager. 3 R.R. at 16 - 17. In addition to the items in the bag tied to the side of the basket/cart, there were other items of merchandise in the cart/basket for which Appellant did not pay as well. 4 R.R. at 30 - 31. A tally of the value of the items for which Appellant had not paid came to \$565.59. 3 R.R. at 22; 6 R.R. State's Exhibit 1. The tally of the value of the items for which Appellant had paid came to \$262.17. 6 R.R. State's Exhibit 2.

3.3 Discussion and Conclusion

First to be noted is that Appellant's trial counsel requested the submission of an instruction in the court's charge to the jury on the lesser-included offense of Theft. 4 R.R. 51. Appellant's trial counsel argued that the basis for this instruction is contained in the legislative history of the Organized Retail Theft statute. 4 R.R. 56. This request was denied by the trial court. 4 R.R. 58.

In this case Appellant does not dispute the fact that the evidence is sufficient to show that Appellant did appropriate property, namely retail merchandise, from HEB in an amount of \$500 or more but less than \$1,500. Appellant does not challenge the sufficiency of the evidence that the Appellant appropriated the retail merchandise without the owner's consent and with the intent to deprive HEB of the property. The challenge made by Appellant in this third issue is that Appellant can not be guilty of the offense of Organized Retail Theft because the offense of "simple" theft by a solitary actor is not a lesser included offense of Organized Retail Theft and that the Indictment gave no notice to Appellant of any of the elements of the offense of simple Theft. Yet the applicability of Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) is not dependent upon whether an offense under § 31.03 is or is not considered a lesser-included offense

nor does the statute include an element of the offense that the actor must have acted in combination with others.

As noted by the lower court the Legislature can enact different statutes that apply to the same conduct with one focusing on a particular aspect of the conduct. The example stated by the lower court is where a person who inflicts serious bodily injury to a child, elderly individual, or disabled individual engages in conduct that violates Penal Code § 22.04, the statute prohibiting injury to a child, elderly individual, or disabled individual. *See* Tex. Penal Code § 22.04(a)(1). However, such conduct also violates Tex. Penal Code § 22.02, the aggravated assault statute. *See id.* § 22.02(a)(1). As further noted by the lower court, the Legislature enacted a separate statute to address the protection of these specific types of vulnerable individuals. *Lang v. State*, 03-15-00332-CR, 2017 Tex. App. LEXIS 4017 at 13, 2017 WL 3081102 (Tex. App. – Austin 2017, pet. granted).

Another example would be the issue of whether criminal trespass is a lesser-included offense of burglary as discussed in *State v. Meru*, 414 S.W.3d 159 (Tex. Crim. App. 2013). In *Meru* the evidence showed that the actor merely kicked in the door thereby committing a partial but not a full entry into the habitation. While each statute deals with the unlawful entry onto the property of another, the definition of entry is different in each statute such that criminal trespass is not

always a lesser-included offense of burglary. If the actor fully enters the curtilage and then only partially enters the building/habitation the prosecution may choose to prosecute for either the burglary or the trespass but the fact that the actor's conduct of trespass in order to get to the building/habitation will be made part of the proof of facts does not mean that the burglary statute can not now be applied to that case simply because the trespass, under these facts, is not a lesser-included offense.

If Appellant's argument were true then Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) could never be applied to the lowest level actor(s), called "boosters" in the Bill Analysis under Appellant's Tab 2.1, since these persons, whether acting alone or as a group, are the ones who begin the process by stealing the retail merchandise from the shelves, the "shoplifters", which is exactly the conduct for which Appellant was convicted. Under Appellant's analysis, since the offense of "simple" Theft can not be a lesser-included offense of Organized Retail Theft, then both "simple shoplifters" as well as "boosters" can only be prosecuted for "simple" Theft. Yet when viewing the individual elements of the two offenses, a "simple shoplifter" of retail merchandise meets all elements of Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011).

Under Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) the elements that the State was obligated to prove were:

1. On or about the 2nd day of October 2013;
 2. Before the presentment of the indictment;
 3. In the County of Burnet and the State of Texas;
 4. The defendant, Terri Regina Lang;
 5. Did then and there intentionally conduct or promote or facilitate;
 6. An activity;
 7. In which the defendant received or possessed or concealed or stored stolen retail merchandise, to wit: groceries, herbal supplements, energy drinks and animal treats;
 8. And the total value of the merchandise involved in the activity was greater than \$500 but less than \$1,500.
- 1 C.R. 4.

As found by the lower court, and is not now challenged by Appellant, the evidence admitted at trial was sufficient to support the verdict of the jury. Had the State chosen to prosecute under Tex. Penal Code § 31.03(a) the facts admitted at trial would have supported a jury verdict of guilty to the offense of “simple” Theft. Yet the State chose to pursue Appellant under Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) and Appellant now argues that this Court must infer an additional element that the actor committed the offense

while acting together with others. This the Court can not do. To require this additional element would be an act of legislating by the Court, something that this Court recognized in its holding in *Ex parte Thompson*, 442 S.W.3d 325, 339 (Tex. Crim. App. 2014).

When the Legislature enacted Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) it had every opportunity to exclude prosecution of the “simple shoplifter” by including the element suggested by Appellant. The Legislature had already made a similar exclusion by requiring an intent to establish, maintain, or participate in a combination or the profits of a combination, or as a member of a street gang before an actor can be convicted of Tex. Penal Code § 71.02(a) (Engaging in Organized Criminal Activity). In fact the penalty set forth in Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) is increased if the actor is determined to have organized, supervised, financed, or managed one or more persons engaged in receiving, possessing, concealing, storing, bartering, selling, or disposing of stolen retail merchandise or merchandise explicitly represented to the person as being stolen retail merchandise. Tex. Penal Code § 31.16 (d)(1)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011). This portion of the statute does contemplate the actor working in concert with others.

The Legislature expressed its concern for the rising impact of theft of retail merchandise as opposed to theft of other properties. See C.S.H.B. 3584 Background and Purpose, Tab 1.1 of Index attached to Appellant's Brief.

Appellant does not assert that Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) is unconstitutional either facially or as applied. She only argues that she is not guilty of Tex. Penal Code § 31.16 (b)(Acts 2011, 82nd Leg., ch. 323, §§3, 4, eff. Sept. 1, 2011) because there is no proof that she was acting together with others as the word "organized" in the title Organized Retail Theft would infer. To infer an additional element merely from a word in the title of a statute would be an act of legislating from the bench.

For these reasons the relief sought by Appellant in this Issue should be denied and the judgment and sentence assessed by the trial court be affirmed.

Summary Of The Argument on Issue No. 2

Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is written in a clear and concise manner in which both the statute as well as the Legislature contemplates the prosecution of a lone individual without requiring proof that the individual was acting together with one or more other individuals.

Appellant argues that the lower court is incorrect in its holding that Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is clear and concise such that it is unnecessary to review extra-textual resources to determine the collective intent of the legislators that voted to pass the bill. The lower court is correct that the text of Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is clear and unambiguous such that there can be only one reasonable interpretation.

Argument On Issue No. 2

2.1 *Principals of Law*

2.1.1 In construing a statute, a reviewing court must "seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014)(citing *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011)).

- 2.1.2 In interpreting statutes, the reviewing court presumes that the Legislature intended for the entire statutory scheme to be effective. *Yazdchi*, 428 S.W.3d at 837; *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). The reviewing court looks first to the statute's literal text, and "we read words and phrases in context and construe them according to the rules of grammar and usage." *Yazdchi* 428 S.W.3d at 837; *Harris*, 359 S.W.3d at 629 (quoting *Lopez v. State*, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008)).
- 2.1.3 The reviewing court must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Yazdchi* 428 S.W.3d at 837; *Harris*, 359 S.W.3d at 629 (quoting *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997)). Words and phrases are construed under the rules of grammar and common usage unless they have acquired technical or particular meaning. *Yazdchi* 428 S.W.3d at 837; *Ex parte Ruthart*, 980 S.W.2d 469, 472 (Tex. Crim. App. 1998).
- 2.1.4 When statutory language is clear and unambiguous, the reviewing court gives effect to its plain meaning unless to do so would lead to absurd consequences that the legislature could not have possibly intended.

Yazdchi 428 S.W.3d at 838; *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); see *Ex parte Valdez*, 401 S.W.3d 651, 655 (Tex. Crim. App. 2013).

2.1.5 The reviewing court does not resort to extra-textual factors unless the language is ambiguous, meaning that it is not plain. *Yazdchi* 428 S.W.3d at 838; see *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012). Ambiguity exists when the statutory language may be understood by reasonably well-informed persons in two or more different senses; conversely, a statute is unambiguous when it permits only one reasonable understanding. *Yazdchi* 428 S.W.3d at 838; *Bryant v. State*, 391 S.W.3d at 92.

2.2 Discussion and Conclusion

As noted by Appellant the lower court determined that Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is clear and concise with no need to resort to extra-textual resources to determine and give effect to the plain intent of the statute. Yet Appellant seeks to show ambiguity in Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) by making comparisons with cases involving other statutes.

Appellant relies on *Lanford v. State*², 847 S.W.2d 581 (Tex. Crim. App. 1993). *Lanford* was a mandamus case involving the assignment of a visiting judge under Tex. Gov't. Code § 74.054(d) to a pending criminal case in Harris County. The question at the center of the case was whether § 74.054(d) was intended to apply only to criminal cases or was intended to apply to both civil and criminal cases. The Fourteenth Court of Appeals, held that the statute was plain in its language. Although taking opposite interpretations, each party asserted that the statute plainly read the way of their interpretation. Appellant argues that the Court of Criminal Appeals held that because the interpretation of the Fourteenth Court of Appeals was polar to that of the parties then the statute was classically ambiguous. Yet the actual holding was:

“After reading § 74.053(d) in context, we cannot agree with the court of appeals and the parties that the meaning of it is “plain”. Indeed, we conclude that subsection (d) is classically ambiguous, as the polar interpretations of the court of appeals and the parties, set out previously, *would suggest*³. In other words, the text of subsection (d), read literally and in context, is capable of being understood two ways:....” *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d at 587.

² The true cite of this case is *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581 (Tex. Crim. App. 1993).

³ Emphasis added.

The *Lanford* Court went on to explain how it came to the conclusion that the statute in question did not apply to criminal cases.

Next Appellant cites the holding in *Allen v. State*, 11 S.W.3d 474, 476 (Tex. App. – Houston [1st Dist.] 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001) where Appellant points to the court stating that the Court of Criminal Appeals “eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text.” The issue in *Allen* was that the defendant was convicted of driving while license suspended. The defendant’s driver’s license had been suspended for 90 days for a prior DWI conviction. After the 90 suspension period was over a law enforcement officer ran the defendant’s driver’s license which was reported as still being suspended for non-payment of the reinstatement fee. The underlying question was does the suspension of the driver’s license continue beyond the 90 day period when the defendant fails to pay the \$100 reinstatement fee. Once the First Court of Appeals made its observation regarding the *Lanford* holding, the court then went on to state that because the interpretation of the parties was opposite to the other’s interpretation then the court was free to examine extra-textual factors including the legislative history and similar provisions as well as the consequences of particular constructions. The conclusion of the court was that the

suspension ended at the end of the original 90 day period and reversed the defendant's conviction for driving while license suspended.

The Court of Criminal Appeals granted the State's Petition for Discretionary Review. While the Court of Criminal Appeals did not address the comment of the First Court of Appeals that the *Lanford* holding "eviscerated" the *Boykin* rule, the Court of Criminal Appeals found that the First Court of Appeals committed error in finding that the statute, which was the basis of the criminal case, was ambiguous.

The Court of Criminal Appeals held:

"Whether Transportation Code § 724.046(a) creates a continuing period of license suspension or not is an issue of first impression in this Court. If the legislative intent behind laws governing the suspension of licenses is to promote public safety of motorists, the collection of an administrative fee does nothing to accomplish that intent and has no direct impact on the public safety of motorists.

"Furthermore, Section 521.374(b) reads, 'The period of suspension or prohibition under Section 521.372(c) continues for an indefinite period of time until the individual successfully completes the educational program.' Tex. Transp. Code § 521.374(b). If the legislature intended the suspension to continue beyond the ninety-day period required by section 724.035 until the \$100 fee was paid, then it could have used language like that in section 521.374(b). Because such language was not used, the period of suspension is not extended by failure to pay the fee."

Allen v. State, 48 S.W.3d 775, 777-778 (Tex. Crim. App. 2001).

In effect the Court of Criminal Appeals held that the First Court of Appeals came to the correct conclusion but the manner in which the lower court came to that conclusion was wrong.

Of particular note is that the holding in *Lanford* did not expressly overrule the anything in the *Boykin* holding. Although the lower court in *Allen* came out and stated that because the parties were at opposite ends in their interpretations of a statute then the appellate courts are automatically free to resort to the Construction Code, the Court of Criminal Appeals, citing *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997), and without addressing whether the parties can automatically raise an issue of ambiguity by simply taking opposite sides, held that it was not proper to resort to extra-textual factors where the language of the statute is clear and concise. It is interesting that the court in *Ex parte Torres* relied on the *Boykin* decision for its opinion.

In analyzing Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011), the lower court correctly sought to read all words and phrases of the statute in context seeking out common definitions of words that are not specifically defined within the Penal Code. *Lang*, 03-15-00332-CR, 2017 WL 1933477 at 13. Appellant seeks to show that the lower court merely picked out the bits and pieces of various definitions of words in order to support a presupposed

result. In fact Appellant states in her argument “Play the game as long as you like:....” The State sees no reason to consider this process as a game.

In addition Appellant continues to argue that prosecuting the simple shoplifter who steals the retail merchandise and then conceals and transports that stolen retail merchandise to a vehicle or a man cave is purely an absurd result. This argument did not sway the lower court which noted that “Given the Legislature’s heightened concern over the theft of retail merchandise – as evidenced by the enactment of a statute solely addressing stolen retail merchandise – it could very well be that the Legislature intended to address every phase concerning the theft of such merchandise, including the moment it becomes stolen, and to punish all those associated with the property, including the one who caused it to be ‘stolen’”. *Lang*, 03-15-00332-CR, 2017 WL 1933477 at 14.

The State of Texas asserts that the holding lower court is correct in that Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is clear and concise without the necessity of resorting to extra-textual resources.

Whether the statute is clear and concise or it is ambiguous, one thing is certain. To hold in favor of Appellant’s argument would require this Court to legislate from the bench. It would mean that a whole new element that requires the State to prove that the actor committed the offense while acting with others be imposed.

The decision as to whether such an element should or should not be imposed is more appropriately left to the Legislature.

For these reasons the relief being sought by Appellant under this Issue should be denied and the judgment and sentence imposed against Appellant should be affirmed.

Summary Of The Argument on Issue No. 1

- (a) The lower court correctly followed the holding of *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) because Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) can be read clearly and without ambiguity.
- (b) The holding of *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) is not in conflict with Tex. Gov. Code § 311.023.

Argument On Issue No. 1

1.1 Principals of Law

1.1.1 In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;

(4) a result feasible of execution is intended; and

(5) public interest is favored over any private interest.

Tex. Gov't. Code § 311.021.

1.1.2 In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;

(2) circumstances under which the statute was enacted;

(3) legislative history;

(4) common law or former statutory provisions, including laws on the same or similar subjects;

(5) consequences of a particular construction;

(6) administrative construction of the statute; and

(7) title (caption), preamble, and emergency provision.

Tex. Gov't. Code § 311.023.

1.1.3 The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.

Tex. Gov't. Code § 311.024.

1.1.4 The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:

(1) "May" creates discretionary authority or grants permission or a power.

(2) "Shall" imposes a duty.

(3) "Must" creates or recognizes a condition precedent.

(4) "Is entitled to" creates or recognizes a right.

(5) "May not" imposes a prohibition and is synonymous with "shall not."

(6) "Is not entitled to" negates a right.

(7) "Is not required to" negates a duty or condition precedent.

Tex. Gov't. Code § 311.016.

1.1.5 (a) The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code.

(b) Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code.

Tex. Penal Code § 1.05 (a) and (b).

1.1.6 When a reviewing court interprets a statute, the court seeks to effectuate the "collective" intent or purpose of the legislators who enacted the legislation.

Camacho v. State, 765 S.W.2d 431 (Tex. Crim. App 1989). The reviewing court does so because the state constitution assigns the lawmaking function to the Legislature while assigning the law interpreting function to the Judiciary. See Tex. Const. art. II, § 1; *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

1.1.7 When the reviewing court attempts to discern this collective legislative intent or purpose, the attention of the court is focused on the literal text of the

statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *Boykin* at 785. This is done because the text of the statute is the law in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for signature. *Id.* The reviewing court focuses on the literal text also because the text is the only definitive evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law. *Id.* There really is no other certain method for determining the collective legislative intent or purpose at some point in the past, even assuming a single intent or purpose was dominant at the time of enactment. *Id.* Yet a third reason for focusing on the literal text is that the Legislature is constitutionally entitled to expect that the Judiciary will faithfully follow the specific text that was adopted. *Id.*

1.1.8 If the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning. *Smith v. State*, 789 S.W.2d 590, 592 (Tex. Crim. App. 1990); *Boykin* at 785. "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract

from such a statute." *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991) (quoting *Ex parte Davis*, 412 S.W.2d 46, 52 (Tex. Crim. App. 1967)); *Boykin* at 785.

1.1.9 If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extra-textual factors as executive or administrative interpretations of the statute or legislative history. *Boykin* at 785-786.

1.1.10 This method of statutory interpretation is of ancient origin and is, in fact, the only method that does not unnecessarily invade the lawmaking province of the Legislature. *Boykin* at 786. The courts of this and other jurisdictions, as well as many commentators, have long recognized and accepted this method as constitutionally and logically compelled. See, e.g., *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 111 S. Ct. 1138, 1146-1147, 113 L. Ed. 2d 68 (1991); *Demarest v. Manspeaker*, 498 U.S. 184, 111 S. Ct. 599, 604, 112 L. Ed. 2d 608 (1991); *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 2574-2575, 105 L. Ed. 2d 377 (1989) (Kennedy, J., concurring); *Caminetti v. United States*, 242 U.S. 470,

485, 37 S. Ct. 192, 61 L. Ed. 442 (1917); *Republicbank Dallas v. Interkal*, 691 S.W.2d 605, 607 (Tex. 1985); *Sparks v. State*, 76 Tex. Crim. 263, 174 S.W. 351, 352 (Tex. Crim. App. 1915); E. Crawford, The Construction of Statutes § 164 (1940); H. Black, Handbook on the Construction and Interpretation of the Laws §§ 24-27, 85 (1896); 2A N. Singer, Sutherland on Statutory Construction §§ 46.01-46.07 (1984 & Supp. 1991); 1 W. LaFare & A. Scott, Substantive Criminal Law § 2.2 (1986); 82 C.J.S. Statutes § 322 (1953).

1.2 Discussion and Conclusion

As noted by this Court in its *Boykin* opinion, the manner of statutory construction as set forth in *Boykin* has been recognized as the proper method as far back as 1896. Penal Code § 1.05, which makes the Code Construction Act applicable to the Penal Code provisions, was first effective January 1, 1974 and the last amendment became effective September 1, 1994. Texas Government Code § 311.023 first became effective on September 1, 1985 and has remained unchanged to this date.

Appellant argues that by not permitting Texas courts to look to the extra-textual resources described in § 311.023 the *Boykin* rule is in conflict with § 311.023 and

Texas Penal Code § 1.05 to such extent that the *Boykin* rule must be overruled. This would perhaps be a sound argument if § 311.023 was a mandatory statute, meaning that it ***required*** a court to consider the listed resources. However § 311.023 is in fact a discretionary statute meaning that a court ***may*** consider the listed resources.

Could this mean that the 69th Legislature was suggesting to this Court in 1985 that the old method of statutory construction should be modified? If this is the case then this Court obviously did not follow the suggestion and for the past 35 years the Legislature has taken no action to require this Court to change the rules of statutory construction. The *Boykin* opinion was handed down in 1991 and is still being followed by this Court as recently as its *Yazdchi* opinion handed down in 2014.

The foundation of Appellant's argument that this conviction is in direct contravention with the legislative history of Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011) is that the legislative history speaks heavily to the idea that there is a substantial impact on retail theft committed by organizations and gangs. Yet this same legislative history gives note to the fact that investigation and prosecution of the organizations and gangs is a daunting task as they are fluid and difficult to identify as a group. Further there is discussion that

the Legislature did not want wayward juveniles to be caught up in being prosecuted under this statute while at the same time thought that prosecutors were better suited to distinguish between the wayward juvenile and the more hard-core criminal. Can it be that this is why the Legislature left out an element that a person could only be convicted under this statute if the person was acting as part of a combination or acting with another? Did the Legislature intend to rely on prosecutorial discretion as to who would be prosecuted as a “simple shoplifter” and who would be prosecuted under Tex. Penal Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011)?

The trial record here established that this was far from a first offense for Appellant. It is undisputed that Appellant has nine prior misdemeanor arrests, four of which resulted in convictions, and three prior felony arrests, one of which was a federal offense which resulted in Appellant’s sole prior felony conviction. These arrests involved larceny, theft, resisting arrest, theft, theft, burglary of a habitation, conspiracy, burglary of a post office, possession of stolen property, along with some marihuana issues and driving while intoxicated issues. 5 R.R. 21 - 22.

Appellant is hardly the wayward youth that the Legislature did not want to be saddled with a conviction under this statute. If the Legislature had wanted to carve out an exception for even the hard-core “simple shoplifter” it could have easily done

so and can still do so in any future legislative session. However the Legislature clearly wanted to clamp down on the rising rates of retail merchandise theft. To dial back the trial courts such that only actors who are acting in some fashion with a “fence”, “wholesaler”, or even if acting together with other “boosters” would require this Court to add another element of proof to the offense. As stated before, this would mean that this Court must legislate from the bench. As previously noted, when enacting this statute the Legislature included a penalty enhancement if the actor is found to be a person who was managing, organizing, financing, or supervising one or more other persons engaged in an activity under subsection (b) of the statute. Clearly the Legislature made it a requirement to show that the actor was acting with others in order to qualify for the enhanced penalty. This one point would indicate that the Legislature meant that a person acting alone could be convicted of the basic offense.

Even if this Court is sympathetic to Appellant’s plight, all that this Court may do is suggest in its opinion that the Legislature needs to reconsider Tex. Penal Code § 31.16 (b) in order to create the “simple shoplifter” exception if it wishes to do so.

However, under the statute as written, the elements set out are clear and unambiguous such that there is no need to resort to extra-textual resources in order to determine and give effect the full intent of the Legislature in enacting Tex. Penal

Code § 31.16 (b) (Acts 2011, 82nd Leg., ch. 323 §§ 3, 4, eff. Sept. 1, 2011). Further, because Government Code § 311.023 is a discretionary statute there is no conflict with the holding in *Boykin* and the facts of this case do not give rise for this Court to reconsider whether the holding in *Boykin* should be modified or totally overruled.

For these reasons the relief sought by Appellant in this Issue should be denied and the judgment and sentence entered against Appellant should be affirmed.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellee prays the Court deny the relief requested by Appellant and affirm the judgment of conviction and sentence entered against Appellant.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

This is to certify that the pertinent portion of this brief contains 6,131 words printed in Aldine401BT 14 font, with footnotes printed in Calibri 12 font, according to the WordPerfect™ X8 word count tool.

/s/ Gary W. Bunyard

Gary W. Bunyard

CERTIFICATE OF SERVICE

This is to certify that a true copy of the above and foregoing instrument, together with this proof of service hereof, has been forwarded on the 4th day of January 2018, to Justin Bradford Smith, Attorney for Appellant, by email and by EServe.

/s/ Gary W. Bunyard

Gary W. Bunyard

Assistant District Attorney